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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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NO. 83-109

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THE FIRST ARABIAN CORPORATION, S.A.,

*Petitioner,*

v.

GHAITH R. PHARAON,

*Respondent.*

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**BRIEF IN OPPOSITION TO  
THE PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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### **QUESTIONS PRESENTED**

1. Whether respondent's cross-claim against petitioner bore a logical relationship to plaintiffs' federal claims such that the cross-claim was within the ancillary jurisdiction of the District Court.

2. Whether the District Court abused its discretion in granting summary judgment on respondent's cross-claim after plaintiffs' federal claims had been settled.

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2. Whether the District Court abused its discretion in granting summary judgment on respondent's cross-claim after plaintiffs' federal claims had been settled.

## STATEMENT OF THE CASE

Petitioner's statement of the case omits key points relating to this petition, particularly in its characterization of the original claim asserted by the plaintiffs in this action. The original plaintiffs, Eli Broad and Donald Kaufman, are former preferred stockholders in the Bank of the Commonwealth in Detroit ("BOC"). They sold their BOC preferred stock to defendants James T. Barnes, Sr. and James T. Barnes, Jr. (collectively, the "Barnes"), but retained certain accrued dividend claims. The Barnes later sold all their interest in BOC, including the preferred stock, to defendant Dr. Ghaith R. Pharaon, who in turn sold all his interest to defendant First Arabian Corporation, S.A. as part of a recapitalization plan in which old preferred stock (and associated dividend claims) was converted to a new class of common stock and additional new common stock was issued and sold to First Arabian. This recapitalization resulted in the extinguishment of plaintiffs' preferred dividend claims. Plaintiffs' original Complaint asserted that this series of events and transactions, culminating in the recapitalization, was part of an unlawful scheme among defendants to extinguish plaintiffs' dividend claims. Plaintiffs sought damages from the Barnes, Dr. Pharaon and First Arabian for the value of the extinguished claims. Appendix to Petition for Certiorari ("Appendix"), at 24a-43a.

The agreement that formed the basis for respondent Pharaon's cross claim is the stock purchase agreement between Pharaon and First Arabian (the "Pharaon/First Arabian Stock Agreement") that was an integral part of the series of transactions attacked by plaintiffs Broad and Kaufman. In that agreement, which was executed on November 12, 1976, First Arabian agreed to buy Pharaon's BOC stock on the same terms that Pharaon had bought it from the Barnes. Thus, First Arabian agreed to pay Pharaon the amounts he had previously paid the Barnes and to assume Pharaon's obligation to make

additional payments to the Barnes due February 1, 1977, February 1, 1978, February 1, 1979, and February 1, 1980.<sup>1</sup>

The recapitalization was approved by BOC shareholders on December 21, 1976. On January 25, 1977, both Pharaon's sale to First Arabian and the issuance of new common by BOC to First Arabian were completed. A follow-up agreement between Pharaon and First Arabian, executed as of the January 25 closing, recited the occurrence of each of the events to which the Pharaon/First Arabian Stock Agreement was subject and provided that First Arabian "hereby assumes the remaining obligations of Pharaon" to the Barnes.

The stock sale completed, First Arabian assumed control of BOC in early 1977. In 1977, 1978 and 1979, First Arabian paid to the Barnes the payments due them under the Barnes/Pharaon Stock Agreement. In the meantime, on June 30, 1977, only six months after consummation of the Pharaon/First Arabian Stock Agreement and the recapitalization, Broad and Kaufman filed their original complaint. Thus, First Arabian made two payments after Broad and Kaufman filed their lawsuit. When the final February 1, 1980 payment of \$750,000 became due, however, First Arabian refused to pay it. Pharaon then paid the \$750,000 owing to the Barnes and sought reimbursement from First Arabian. First Arabian refused to reimburse Pharaon.

Pharaon promptly filed a cross-claim in the Broad and Kaufman principal action and sought damages for First Arabian's breach of the Pharaon/First Arabian stock agreement. Pharaon predicated jurisdiction of his cross-claim on the doctrine of ancillary jurisdiction, stating that the cross-claim "arise[s] from the transaction or occurrence of the original action or relates to property that is the subject matter of the original action" (Pharaon's Motion for Leave to File

<sup>1</sup> Respondent's Statement of the Case is based upon the voluminous summary judgment record in the District Court. Unless otherwise indicated, the facts as set forth herein are uncontroverted. Should the Court grant the writ of certiorari, respondent will supplement the Appendix with the relevant pleadings.

Supplemental and Amended Pleading, Appendix, at 21a-24a). On March 18, 1980, the court granted Pharaon's motion for leave to file (Appendix, at 19a). Thereafter, on April 29, 1980, First Arabian filed its answer to Pharaon's cross-claim; it did not at that time object to jurisdiction, nor did it suggest that the cross-claim was not otherwise properly before the court. Indeed, the only excuse First Arabian advanced for its failure to make the last payment was a broad assertion that the Broad and Kaufman complaint brought into question its obligation.

By motion dated November 13, 1980, before the dismissal of the plaintiffs' claims, Pharaon moved for summary judgment on his cross-claim against First Arabian. On January 5, 1981, nearly a week after responses to that motion were due, and less than two weeks before the hearing date, First Arabian filed its motion to dismiss for lack of jurisdiction, asserting for the first time that Pharaon's cross-claim did not "arise out of the same transaction or occurrence" as plaintiffs' original claim.<sup>2</sup> The District Court denied First Arabian's jurisdictional motion (Appendix, at 7a, 9a), and the Sixth Circuit affirmed (Appendix, at 1a-4a).

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<sup>2</sup> Because First Arabian's motion questioned the court's subject-matter jurisdiction, the District Court was obliged to consider it despite its having been filed at the last minute. The timing of the motion is relevant, however, as it indicates that the motion (like petitioner's opposition to respondent's motion for summary judgment and petitioner's motion for leave to file an amended answer filed a day later) constituted a last-ditch, frantic effort to stave off Pharaon's collection of a debt on which First Arabian reneged over three and one-half years ago.

## ARGUMENT

### I.

#### **RESPONDENT'S CROSS-CLAIM AGAINST PETITIONER BORE A LOGICAL RELATIONSHIP TO PLAINTIFFS' FEDERAL CLAIMS AND WAS WITHIN THE DISTRICT COURT'S ANCILLARY JURISDICTION.**

Despite petitioner First Arabian's protestations to the contrary, there is very little disagreement about the controlling legal standards for judging the jurisdictional issue in this case. It is well-established that cross-claims under Rule 13(g), Federal Rules of Civil Procedure, fall within the ancillary jurisdiction of the federal courts and need not present independent grounds for federal jurisdiction. See 6 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §1433, at 177-180 (1975). Further, it is universally agreed that to sustain jurisdiction, respondent Pharaon need only demonstrate that his cross-claim was proper under Rule 13(g); that is, that it was a claim "arising out of the transaction or occurrence that is the subject matter of either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." This rule has been construed liberally "to avoid multiple suits and to encourage the determination of the entire controversy among the parties before the court . . . and in order to settle as many related claims as possible in a single action." *Id.* §1431, at 161.

Because the Rule 13(g) standard—"arising out of the transaction or occurrence that is the subject matter . . . of the original action"—is virtually identical in language to that in Rule 13(a) governing compulsory counterclaims, many courts look to cases construing Rule 13(a) in deciding whether a cross-claim falls within Rule 13(g). The leading case regarding the "same transaction or occurrence" standard is *Moore v. New*

*York Cotton Exchange*, 270 U.S. 593, 610 (1926). In that case, the Court adopted a liberal, flexible definition of the "same transaction or occurrence" standard:

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. [Citations omitted.]

The Sixth Circuit adopted the *Moore* "logical relationship" standard for determining whether a cross-claim is within the ancillary jurisdiction in *Lasa Per L'Industria Del Marmo Societe Per Azioni v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969). See also *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978) (*Moore* "logical relationship" test is appropriate standard for determination of whether counterclaim is compulsory).

The Sixth Circuit's decision in this case is but a straightforward application of these settled principles. The Pharaon/First Arabian Stock Agreement clearly "is one of the links in the chain which constitutes the transaction upon which" plaintiffs Broad and Kaufman predicated their causes of action.<sup>3</sup> *Moore, supra*, 270 U.S. at 610. As explained above, the Broad and Kaufman complaint challenged the extinguishment of certain preferred dividend rights. The BOC recapitalization which actually extinguished those rights was approved by the shareholders on December 21, 1976, just over a month after Pharaon and First Arabian had executed the agreement sued upon here. The Pharaon/First Arabian Stock Agreement was contingent on stockholder approval of both the conversion of preferred into new common stock and the issuance of new common to First Arabian. The issuance of new common stock to First Arabian and the conversion plan were presented as a

<sup>3</sup> Respondent has devoted little attention to the "same property" test in Rule 13(g) because the "transaction or occurrence" test so clearly encompasses Pharaon's cross-claim. Pharaon's cross-claim satisfies the former test as well because the property involved in the original lawsuit and the cross-claim is the BOC preferred stock and related dividend claim.

"single proposal" to the shareholders, and the resolution submitted to and approved by the shareholders encompassed both the conversion and the issuance of new common to First Arabian. Properly viewed, the Pharaon/First Arabian Stock Agreement, the conversion of old preferred into new common, and the issuance of additional new common to First Arabian were in fact one transaction: all were contingent on the others, and all were negotiated, approved and consummated at approximately the same time, with the same ultimate purpose—the recapitalization of the Bank under First Arabian's control and direction.

Contrary to assertions made by petitioner, Broad and Kaufman's proof of liability against First Arabian necessarily involved proof of the Pharaon/First Arabian Stock Purchase Agreement. Without such proof, plaintiffs had no case against any defendant and certainly not against First Arabian. Indeed, the only element of Pharaon's cross-claim not raised by Broad and Kaufman's complaint against Pharaon and First Arabian was First Arabian's non-payment of the last installment, a fact it readily admitted. The essential element of the Pharaon cross-claim—the agreement itself—was an integral, essential element of the Broad and Kaufman claim. Pharaon's claim (breach of his agreement with First Arabian) thus arose out of the same transaction or occurrence that was the subject matter of plaintiffs Broad and Kaufman's suit (the allegedly conspiratorial recapitalization and related transactions).

If further evidence of the relatedness of Pharaon's cross-claim to plaintiffs' original claim were needed, First Arabian itself provided it. To acquire the BOC stock and to become a bank holding company, First Arabian was required to file an application with the Board of Governors of the Federal Reserve System. In its 1976 application, First Arabian stated: "The purchase of the bank stock by the applicant is an integral part of the proposed recapitalization plan for the bank." Also, in its Original Answer to Pharaon's Cross-claim, First Arabian stated, in paragraph 2, "that the Complaint in the instant action

questions whether Pharaon has fully performed all his obligations pursuant to the [Pharaon/First Arabian] stock agreement"; and, in paragraph 3, that "Plaintiff's Complaint questions whether Pharaon has breached the stock purchase agreement by not providing adequate consideration to this Defendant, by not fulfilling the representations and warranty quoted in paragraph 2 above, and by not fairly dealing with Defendant in that, on information and belief, Pharaon knew at the time of the [Pharaon/First Arabian Stock Agreement] that Plaintiffs might assert the claims set forth in the instant action but did not disclose the same to this Defendant." These allegations were also contained in First Arabian's proposed First Amended Answer (filed at the same time as its jurisdictional motion) and were apparently seen by First Arabian as sufficient to raise a defense to Pharaon's claim.

It is inconsistent for First Arabian to assert that Broad and Kaufman's original claim and Pharaon's cross-claim are not logically related, while at the same time raising Broad and Kaufman's allegations in defense to the cross-claim. Several courts have looked to the defenses asserted in determining the "logical relationship" between claims. *See, e.g., E. J. Korvette Co. v. Parker Pen Co.*, 17 F.R.D. 267 (S.D.N.Y. 1955) (defense "best demonstrated" logical relationship). In this case, had the plaintiffs' claims not been settled, acceptance of First Arabian's position would have rendered two trials of the same issues a virtual certainty and created the possibility of inconsistent results, in that Pharaon would have been required to file an entirely separate action against which First Arabian would have defended based on the allegations contained in Broad and Kaufman's suit. The eventual settlement of Broad and Kaufman's claim did not destroy the interrelationship of the cross-claim and the original suit; rather, the settlement destroyed the only defense to Pharaon's claim that First Arabian could conceive.

## II.

**THE STANDARDS GOVERNING THE EXERCISE OF ANCILLARY JURISDICTION DO NOT REQUIRE SUPPLEMENTATION OR EXPLICATION BY THIS COURT.**

In an attempt to create an issue where none exists, First Arabian seizes upon some differences in the language used by the various circuits and argues that those circuits have “split” on the question of the standard governing the exercise of ancillary jurisdiction. In particular, First Arabian appears to argue that the standard is not that set forth in *Moore*—“logical relationship”—but some other, allegedly more exacting standard. Although it never actually commits itself to what that other standard should be, First Arabian extracts quotations from this Court’s opinion in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), for the proposition, tentatively asserted, that the governing standard is one of “logical dependence.” Petition for Writ of Certiorari (“Petition”), at 13-14. This reading of *Owen Equipment* is, at best, strained.

In *Owen Equipment*, this Court held that a plaintiff could not assert a nonfederal claim against a nondiverse third-party defendant because to allow assertion of such a claim as ancillary would “eviscerate” and “evade completely” the requirement of complete diversity. 437 U.S. at 375. The Court stated that “the context in which the nonfederal claim is asserted is crucial” in determining whether ancillary jurisdiction exists. *Id.* at 376. In examining the context in which the particular claim at issue in *Owen Equipment* was asserted, the Court emphasized two factors as distinguishing that claim from others in which ancillary jurisdiction had been sustained. First, the Court compared it to a third-party impleader action which, as the Court stated, is *always* ancillary. A third party impleader action depends in part on the resolution of the primary claim; its relation to the original complaint, therefore, is “not mere factual similarity but logical dependence.” *Id.* at 376. Second,

the Court noted that, unlike most other ancillary claims, the claim at issue in *Owen Equipment* was asserted by plaintiff, "who voluntarily chose to bring suit upon a state-law claim in a federal court." Claims by a defending party "haled into court against his will" stand on a much different basis. *Id.*

First Arabian attempts to use the Court's third party impleader example as the basis for its argument that *Owen Equipment* announced a new "logical dependence" test for determining whether a particular claim is within the ancillary jurisdiction. But, as the preceding discussion indicates, *Owen Equipment* provides no support for this argument. *Owen Equipment* certainly does not say that it is setting forth a new standard. And surely the Court's characterization of a particular type of claim (impleader) that is always within the ancillary jurisdiction—a characterization issued in the course of a discussion about an "example" of claims within the ancillary jurisdiction—cannot be read to announce a departure from previous, longstanding decisions. Indeed, were "logical dependence" the governing standard, it is difficult to imagine any claim other than third-party impleader that would satisfy it.

In order to buttress its "logical dependence" argument, First Arabian relies heavily on three cases from the Fifth and Eleventh Circuits: *Amco Construction Co. v. Mississippi State Building Commission*, 602 F.2d 730 (5th Cir. 1979); *Travelers Insurance Co. v. First National Bank of Shreveport*, 675 F.2d 633 (5th Cir. 1982); and *Eagerton v. Valuations, Inc.*, 698 F.2d 1115 (11th Cir. 1983). This reliance is misplaced. In each of these cases, "logical relationship" is stated as the governing standard. See *Amco*, *supra*, 602 F.2d at 733; *Travelers*, *supra*, 675 F.2d at 638; *Eagerton*, *supra*, 698 F.2d at 1119. And in none of them is "logical dependence" adopted as the sole and governing standard; rather, all hold that a claim is within the ancillary jurisdiction if there is a logical relationship between it and the principal claim and the "same aggregate of operative facts serves as the basis for both claims." *Id.*

Petitioner invites this Court to grant certiorari in this case in order to elaborate "substantive criteria that are determinative of the existence of a proper cross-claim and the methodology by which those criteria are applied" and "to supplement *Owen Equipment* relative to particulars of ancillary jurisdiction." Petition, at 10, 15. Apparently, petitioner would like this Court to announce some general, all-encompassing rule. But this is precisely what the Court has previously declined to do in a related situation, and for good reason:

For purposes of addressing the jurisdictional question in this case, however, we think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with the countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any "principled" differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences.

*Aldinger v. Howard*, 427 U.S. 1, 13 (1976).

The principle stated in *Aldinger* applies here as well: the question of whether ancillary jurisdiction exists, given the various contexts in which the question can arise and the myriad of potential fact situations, simply cannot be reduced to some precise and mechanical rule or formulation. Rather, the question must be decided on a case-by-case basis within the general parameters set forth by this Court in such cases as *Moore* and *Owen Equipment*. Although one might argue with the results in various cases and point to some differences in the articulation of the standard, the lower federal courts have been deciding the question on precisely that basis for the fifty-seven years since *Moore*. The Sixth Circuit's decision below is an unexceptionable application of these settled principles. Respondent's cross-claim bore a logical relationship to the plaintiff's original claim, arose out of the same transaction or occurrence, and was based on the same operative facts; it was, as both the District Court and the Sixth Circuit found, clearly within the District Court's ancillary jurisdiction.

## III.

**THE DISTRICT COURT'S RETENTION OF THE CROSS-CLAIM AFTER THE PRINCIPAL CLAIM HAD BEEN SETTLED WAS A PROPER EXERCISE OF ITS DISCRETION.**

Petitioner argues, in the third section of its Petition, that even if respondent's claim was supported by ancillary jurisdiction, it should have been dismissed because the federal claim was settled prior to trial. Again, petitioner attempts to create controversy where none exists by stating that the circuits have adopted inconsistent positions on this issue. This is simply not true.

Petitioner cites no cases holding that the federal courts do not have the *power* to exercise jurisdiction over an ancillary claim after the federal claims have been dismissed or settled prior to trial. Indeed, the cases it relies upon (those cited in footnote 11 of the Petition and related text for the proposition that ancillary state claims should generally be dismissed when the primary federal claim has been settled) expressly recognize that the question is one of discretion. *See Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1041-42 (5th Cir. 1982) (because "there will be instances in which retention of the third-party claim, even after the settlement of the main claim, may be appropriate," district courts have a "measure of discretion in determining whether to retain their ancillary jurisdiction over appended state claims"); *Cenco, Inc. v. Seidman & Seidman*, 686 F.2d 449, 458-59 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982) (on remand, district court to balance relevant considerations in determining whether to retain ancillary claims); *Waste Systems, Inc. v. Clean Land Air Water Corp.*, 683 F.2d 927, 930-31 (5th Cir. 1982) (jurisdiction exists, but district court abused discretion in retaining state law claim in view of unresolved technical questions of state law); *Putnam v. Williams*, 652 F.2d 497, 502 (5th Cir. 1981) (jurisdiction exists, but no abuse of discretion in dismissing ancillary claims);

*Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520, 523 (5th Cir. 1980) (refusal to exercise jurisdiction "not an abuse of discretion"); *Federman v. Empire Fire and Marine Insurance Co.*, 597 F.2d 798, 809 (2d Cir. 1979) (potential prejudice to third-party plaintiff was properly considered, and district court did not abuse discretion in retaining case instead of dismissing it); *Propps v. Weihe, Black & Jeffries*, 582 F.2d 1354, 1356 (4th Cir. 1978) ("abuse of discretion is the test"; here, no abuse of discretion in dismissing third party complaint); *Rosario v. American Export-Isbrandsten Lines, Inc.*, 531 F.2d 1227, 1233 n.17 (3d Cir. 1976), *cert. denied*, 429 U.S. 857 (1977) (court's power to retain ancillary claim characterized as "discretionary"). The only other case cited, *McDonald v. Oliver*, 642 F.2d 169 (5th Cir. 1981), does not even address the relevant issue because of the unusual circumstance that the ancillary claim had not been filed until after the original lawsuit had been dismissed.

The existence of continued power to hear and decide ancillary claims follows from the well-established rule that jurisdiction, once acquired, is not lost because of subsequent events. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 404-405 & n.6 (1970):

We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.<sup>6</sup> The Court has shunned this view.

<sup>6</sup> A persuasive analogy is to be found in the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well-founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of \$10,000.

Thus, the sole question presented by this aspect of the Petition is whether the District Court abused its discretion in retaining Pharaon's ancillary cross-claim. That Court clearly recognized that the issue called for the exercise of its discretion

(Appendix, at 13a-16a) and its decision to retain jurisdiction cannot be faulted. Among the factors supporting the District Court's decision, some of which it explicitly relied upon, are the following: the case, and the cross-claim, had been pending for a long time; petitioner had waited until the absolutely last moment to raise its jurisdictional objection; dismissal would have severely prejudiced respondent, in that he would likely have been faced with personal jurisdiction and forum non conveniens objections from petitioner had he been forced to refile his action in the state courts; and, as the District Court noted in denying petitioner's leave to amend its pleadings, petitioner's defenses to respondent's claim were of "doubtful legal sufficiency." In addition, the possibility of dismissal of Pharaon's cross-claim would likely have prevented the settlement of the principal claim. The cross-claim was expressly excluded from the settlement, and the amount Pharaon paid in settlement to Broad and Kaufman (\$25,000) was far less significant than his claim against First Arabian.

In sum, the District Court based its decision to retain jurisdiction on good sense and the eminently reasonable ground that dismissal would work substantial injustice, in that it would allow petitioner yet another opportunity to delay—and possibly avoid—payment of its just debt and would reward petitioner's dilatory and obstructionist tactics by permitting it to continue to retain, for perhaps many years, money owing respondent and to earn for itself in the interim the then-substantial difference between the legal and market interest rates. As the Fifth Circuit put it in a similar case, "judicial economy, convenience and fairness to the litigants—the hallmarks of the pendent jurisdiction doctrine—" were better served by the District Court's exercise of its discretionary jurisdiction. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295 (5th Cir. 1983).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

**RESPECTFULLY SUBMITTED,**

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